Supreme Court, U.S.
FILED
05-24 JUN 29 2005
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

JOHN KILGOUR LENTELL,

Petitioner,

v.

MERRILL LYNCH & CO. and HENRY M. BLODGET,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TRACY D. REZVANI
Counsel of Record
DOUGLAS G. THOMPSON
MICHAEL G. MCLELLAN
FINKELSTEIN, THOMPSON, AND LOUGHRAN
1050 30th St. NW
Washington, DC 20007
(202) 337-8000

Attorneys for Petitioner

195152

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

I. Has a plaintiff in a securities fraud class action adequately pled loss causation by alleging both (1) purchase of the stock at a price artificially inflated by fraudulent securities analyst recommendations, and (2) economic loss when the artificial inflation is removed from the stock's price by foreseeable operation of the market forces of supply and demand prior to an explicit disclosure of the fraud?

II. Where the Court of Appeals announced a new and more stringent standard for pleading loss causation, was it a denial of due process not to permit an opportunity to amend the pleadings to meet the new standard?

PARTIES TO THE PROCEEDING

Petitioner is John Kilgour Lentell

Respondents are Merrill Lynch & Co. Inc. and Henry M. Blodget

Brett Raynes and Juliet Raynes were appellants in the United States Court of Appeals for the Second Circuit but are not parties to this Petition.

Petitioner John Kilgour Lentell is lead plaintiff in a putative class action brought on behalf of investors in 24/7 Real Media, Inc against Respondents. Brett and Juliet Raynes were lead plaintiffs in a putative class action brought on behalf of investors in Interliant, Inc. against Respondents. The two cases were consolidated for appeal in the United States Court of Appeals for the Second Circuit. Brett and Juliet Rayes are not seeking review of the Second Circuit's Opinion before this Court and are accordingly not parties to this Petition. The present petition is thus filed solely on behalf of Lentell.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Constitutional Provision Involved	1
Statement of the Case	2
A. Factual Background	5
1. Conflicts of Interest Within Merrill Lynch Gave Rise to Fraudulent Conduct	5
2. The Fraudulent Conduct Caused Losses to Investors in 24/7	7
B. Proceedings Below	10
1. Coordination of the Cases	10
2. Motions to Dismiss	10
3. The Decision on Appeal	11

Contents

	Page
Reasons for Granting the Petition	12
I. Review Is Necessary To Resolve A Split Among The Circuits And Clarify The Loss Causation Pleading Requirements	13
A. The Second Circuit	13
1. The *Suez* Standard	13
2. The *Emergent* Standard	14
3. The *Lentell* Standard	15
B. The Seventh Circuit	16
C. The Eleventh Circuit	18
D. The Third Circuit	19
E. *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005)	20
II. Supreme Court Review Is Necessary To Clarify That Due Process Requires Leave To Amend When The Court Of Appeals Adopts A New, More Stringent Pleading Standard	24
Conclusion	28

TABLE OF CITED AUTHORITIES

Page

Cases:

Bastian v. Petren Resources Corp.,
892 F.2d 680 (7th Cir. 1990) 16

Bennett v. U.S. Trust Co.,
770 F.2d 308 (2d Cir. 1985) 13

Blatt v. Muse Tech., Inc.,
No. 01-11010, 2002 WL 31107537
(D. Mass. Aug. 27, 2002) 26

Brown v. Coach Stores,
163 F.3d 706 (2d Cir. 1998) 25

Caremark, Inc. v. Coram Healthcare Corp.,
113 F.3d 645 (7th Cir. 1997) 16, 26

Coates v. Heartland Wireless Communications, Inc.,
26 F. Supp. 2d 910 (N.D. Tex. 1998) 26

Danis v. USN Communs., Inc.,
73 F. Supp. 2d 923 (N.D. Ill. 1999) 18, 21, 23

DeMarco v. Robertson Stephens, Inc.,
No. 03 Civ. 590, 2004 U.S. Dist. LEXIS
(S.D.N.Y. Jan. 9, 2004) 23

Dura Pharms., Inc. v. Broudo,
125 S. Ct. 1627 (U.S. 2005) 4, 12, 20, 21, 26

Emergent Cap. Inv. Mgmt., LLC
v. Stonepath Group, Inc.,
343 F.3d 189 (2d Cir. 2003) 13, 14, 15

Cited Authorities

Page

Fogarazzo v. Lehman Brothers, Inc.,
341 F. Supp. 2d 274 (S.D.N.Y. 2004) 21, 22

Gebhardt v. Conagra Foods, Inc.,
335 F.3d 824 (8th Cir. 2003) 26

Hatch v. Federal Energy Regulatory Com.,
654 F.2d 825 (D.C. Cir. 1981) 25

In re Control Data Corp. Sec. Litig.,
933 F.2d 616 (8th Cir. 1991) 14

In re Electronic Data Sys. Corp. Sec. and ERISA Litig.,
298 F. Supp. 2d 544 (E.D. Tex. 2004) 26

In re Initial Public Offering Sec. Litig.,
287 F. Supp. 2d at 672 14

In re Initial Public Offering Sec. Litig.,
241 F. Supp. 2d 281 (S.D.N.Y. 2003) 14

In re Rhythms Secs. Litig.,
300 F. Supp. 2d 1081 (D. Colo. 2004) 16

Joint Anti-Fascist Refugee Committee v. McGrath,
341 U.S. 123 (1951) 25

Knapp v. Ernst & Whinney,
90 F.3d 1431 (9th Cir. 1996) 14

Lentell v. Merrill Lynch & Co.,
396 F.3d 161 (2d Cir. 2005) ..... *passim*

Cited Authorities

Page

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (U.S. 1982) 24

Marbury Management Inc. v. Kohn,
629 F.2d 705 (2d Cir. 1980) 13

Morgan v. United States,
304 U.S. 1 (1938) 25

Retsky Family Ltd. Partnership v. Price Waterhouse LLP,
No. 97-7694, 2001 U.S. Dist. Lexis 20397
(N.D. Ill. 1998) 21, 23

Robbins v. Koger Props., Inc.,
116 F.3d 1441 (11th Cir. 1997) 18, 19

Semerenko v. Cendant Corp.,
223 F.3d 165 (3d Cir. 2000) 19, 20

Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, 357 U.S. 197 (U.S. 1958) 24, 25

Sun-Land Nurseries, Inc. v. Southern California Dist. Council of Lanorers,
793 F.2d 1110 (9th Cir. 1986) 25

Suez Equity Inv, L.P. v. Toronto-Dominion Bank,
250 F.3d 87 (2d Cir. 2001) 13, 14

Cited Authorities

Page

Swack v. Credit Suisse First Boston,
No. 02-11943-DPW, 2004 U.S. Dist.
LEXIS 22749 (D. Mass. 2004) 6, 21, 22, 23

Tracinda Corp. v. Daimlerchrysler AG,
197 F. Supp. 2d 42 (D. Del. 2002) 26

West Ohio Gas Co. v. Public Utilities Comm'n,
294 U.S. 63 (1935) 25

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Decided January 20, 2005 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of New York .. 33a

Appendix C — Decision And Order Of The United States District Court, Southern District Of New York Dated June 30, 2003 ..... 64a

Appendix D — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing En Banc Dated And Filed March 31, 2005 ..... 127a

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a–32a) is reported at 396 F.3d 161 (2d Cir. 2005). The District Court's opinion (Pet. App. 64a-126a) is reported at 273 F. Supp. 2d 351 (S.D.N.Y. 2003).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on January 20, 2005, and a petition for *en banc* review was denied on March 31, 2005. Pet. App. 127a-128a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The relevant provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*, including the Private Securities Litigation Reform Act of 1995 (the "Reform Act"), P.L. 104-67, 1995 HR 1058, involved are:

15 U.S.C. § 78u-4

(b) Requirements for securities fraud actions.

* * *

(4) Loss causation.

In any private action arising under this title, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages.

The relevant constitutional provision involved is:

U.S. Const. Am. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This is a securities fraud class action brought on behalf of purchasers of common stock in 24/7 Real Media, Inc. ("24/7"). Petitioner's complaint was dismissed in the District Court for, *inter alia*, failing to allege "loss causation" within the meaning of the federal securities laws. Pet. App. 64a – 126a. That dismissal was affirmed by the Second Circuit. Pet. App. 1a – 32a. This opinion created a circuit split. *See* Section I, *infra* pp. 13-23.

The complaint alleged that Respondents (who, among other roles, were respected and influential securities analysts)

---

1. The 24/7 Class Period extended from May 12, 1999 to November 9, 2000. The 24/7 class action was one of two separate putative class actions brought on behalf of investors in Merrill-recommended stocks which were consolidated for appeal. (the other was on behalf of purchasers of Interliant, Inc. common stock. *See In re Merrill Lynch & Co., Inc. Interliant, Inc. Research Reports Securities Litigation*, No. 02-CV-3321(MP) (S.D.N.Y.)). Only the Lentell (24/7) lead plaintiffs are in filing this petition; the Interliant plaintiffs are not parties to this petition.

issued a number of materially misleading positive analyst reports and buy recommendations on a number of Internet stocks to attract lucrative investment banking business for themselves. The falsely positive reports induced artificial excess demand for the stocks and thus artificially inflated the prices of the stocks.

Respondents maintained this artificial inflation as long as possible by successively recommending purchase of the stocks at ever-increasing prices and predicting future appreciation to even higher price targets; in doing so, Respondents fueled a market frenzy for the stocks and induced more purchase demand at higher prices than would have existed in a market untainted by the fraudulent research reports.

Petitioner's loss causation theory is that over time, Respondents' ability to maintain the artificial inflation waned as the market gradually realized the disconnect between the research recommendations and the true values of the stocks, and as it became increasingly more difficult to generate sufficient additional purchase demand by means of repetitive fraudulent buy recommendations. The inevitable, subsequent market correction caused a collapse in the market prices of the stocks, which lost the majority of their market values before Respondents finally and belatedly downgraded their research ratings and well before the fraudulent nature of the original buy recommendations was publicly revealed.

In essence, the analyst fraud created an undisclosed investment risk that purchasers would suffer substantial losses when the inevitable market correction eventually occurred. The materialization of this risk – concealed at all relevant times by Respondents – was the ultimate cause of the investors' losses. By their false and misleading buy recommendations, Respondents had set in motion an engine that ineluctably, through a chain of foreseeable, connected events, led to the losses.

This Court has recently held that an allegation of "purchase price inflation ***alone***" is insufficient to plead loss causation. *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627, 1630 (2005) (emphasis added). However, Petitioner's theory is that the particular kind of price inflationary scheme employed, involving fraudulent buy recommendations by influential market analysts to induce excess, artificial demand, as opposed to a scheme of false or misleading statements of fact about a company's business or operations, contains within itself the seeds of inevitable market correction and loss.

Where a stock price is allegedly inflated by a factual misrepresentation inflating a company's earnings, for example, presumably the price inflation remains embedded in the stock price until the earnings inflation is corrected by a public disclosure of the true, lower earnings. The artificial price inflation of the kind engendered by analyst fraud, however, does not presumably remain imbedded in the price until disclosure of the fraud but often is weeded out of the price over time by the natural operation of supply and demand as the performance of the stock fails to live up to the analyst recommendations. The market correction itself takes the place of a corrective disclosure in revealing the falsity of the analyst recommendations (even though it may not reveal that the recommendations were published with fraudulent intent).

In these circumstances, a plaintiff has adequately pled that the economic loss was proximately caused by the analyst fraud even though the decline in stock price was not triggered by, but pre-dated, a corrective disclosure of the fraud.

A. Factual Background

1. Conflicts of Interest Within Merrill Lynch Gave Rise to Fraudulent Conduct

Respondents here are (1) Merrill Lynch & Co. ("Merrill") a financial service company and (2) Henry Blodget ("Blodget"), a former "star" analyst for that company. Merrill provides two services relevant to this petition.

First, as an investment bank, Merrill claims to be a leading global underwriter of debt and equity securities. Second, through its Global Securities Research & Economics Group, Merrill claims to rank among the leading research providers in the securities industry and, in that capacity, issues periodic reports purportedly detailing objective research and analysis of various securities.

The performance of these two functions creates an inherent conflict of interest, insofar as promoting Merrill's investment banking business requires currying the favor of securities issuers, whereas producing objective reports necessitates maintaining independence from those same issuers. The risk created by this conflict is that investment bankers could influence analysts' ratings for the stock of existing or potential investment banking clients. Unsurprisingly, this risk is exacerbated when an analyst's monetary compensation is affected, directly or indirectly, by the analysts' contribution to investment banking business.

Typically, securities firms eliminate this risk by establishing so-called "Chinese Walls" between investment banking and research, which restrict and monitor the flow of information between the two divisions. While Merrill claimed to have implemented such a protective measure, this representation was false.

In fact, Merrill's business was characterized by undisclosed material conflicts of interest, including secret agreements between the Analysts and the Investment Bankers to "trade" favorable, bullish analyst reports for investment banking business directed to Merrill and secret sharing of investment banking fees among Merrill Lynch and its Internet analysts.

Throughout the Class Period, the Internet Group never issued a single report which included a "Reduce" or "Sell" recommendation or rating – ***even when contemporaneous e-mails show that they personally believed the stock would decline.*** Respondents concealed from the investing public this policy and practice, because rating any Internet stock lower than "Accumulate" would jeopardize efforts to obtain investment banking business from that company.

Thus, Merrill issued analyst reports containing positive investment recommendations that did not reflect the true opinions of the analysts and which concealed the lack of any rational basis underpinning the recommendations contained in those reports. As Merrill and Blodget were widely respected and influential analysts, these reports had the effect of inflating the stock prices above those which would otherwise have prevailed. The artificially inflated prices eventually collapsed and fell to a fraction of their peak inflated values.

The eventual price collapse resulted from two factors. First, as the market gradually came to realize the falsity of the recommendations, the ability of Merrill to continue to generate high levels of buying demand declined and the prices correspondingly fell. As one court put it, "[a]s the gap between rating and reality widen[ed], however, the analyst's ratings gradually [lost] credibility and the market value[d] them less and less." *Swack v. Credit Suisse First Boston*, No. 02-11943-DPW, 2004 U.S. Dist. LEXIS 22749 at *14 (D. Mass. 2004). Second, when Merrill belatedly downgraded its ratings and recommendations, the stock prices declined even further.

2. The Fraudulent Conduct Caused Losses to Investors in 24/7

Respondents' research coverage of 24/7 Real Media, Inc., is a paradigmatic example of the operation of the scheme outlined above.

Merrill served as lead underwriter for 24/7's August 14, 1998 initial public offering, earning at least $1.47 million in underwriting fees. In September 1998 (soon after the IPO), Merrill initiated coverage on 24/7 with an "Accumulate/Buy" recommendation.

On April 27, 1999, 24/7 issued additional common stock through a Secondary Offering of 3.5 million shares priced at $46.00 per share. Merrill, again, served as lead underwriter and earned another $1.77 million in underwriter fees. Two weeks later, 24/7 stock was trading at $45.125 a share. Once Blodget arrived at Merrill (at the start of the class period), he began the process of inflating 24/7's price by issuing a report "reinstating coverage" and assigning an "Accumulate/Buy" (2-1) rating, with a "12-18 month price objective of around $75."

By August 11, 1999, 24/7's share price had declined to $26.75, a drop of 42% from the $46 secondary offering price of April 27. To halt the decline, Respondents issued a report upgrading 24/7 from "Accumulate/Buy" to "Buy/Buy." After that report was issued, 24/7 stock halted its recent slide and surged ahead by $2.25 per share, or nearly 10%, to close at $29.00 per share the next day.

On September 9, 1999, Merrill issued a report that allayed concerns over successive downward revisions of 24/7 earnings per share estimates by increasing estimates of 1999 and 2000 revenue 17% and 19%, respectively, and stating that 24/7 "remains significantly undervalued relative to

comparative stocks." This report and two other equally positive September reports boosted the price. By November 9, 1999, the stock closed at $44.625 per share.

Respondents issued yet another report on November 3, 1999, reiterating their belief that the stock was undervalued, identifying 24/7 as a potential acquisition target and, for the first time, introducing a new valuation method – valuing 24/7 on a "breakup basis" – to justify the continued "Buy" recommendation in light of poor earnings performance. The November 3, 1999 report caused 24/7 stock to jump in a single day by more that $6.50 per share, or more than 14 percent, to close at $51.1875 per share.

Barely one month later, Merrill reignited the 24/7 engine by issuing another report, emphasizing the new "breakup valuation" theory. The December 9, 1999 report caused 24/7 stock to increase by more that $9 per share over the next two trading days, or more than 17%, to close at $63.4375 per share on December 12, 1999.

On December 20, 1999, Respondents raised the price target for 24/7 stock to $85 per share. The next day, 24/7 reached its all-time high of $65.25.

On March 6, 2000, Virginia Syer, an Internet Group analyst and co-author with Blodget of the 24/7 reports, drafted an analyst report which she emailed to Blodget for his approval, commenting that she was "trying to be oblique to help stock in anticipation of downgrade on wed [nesday] [sic] - so we can say we were expecting great Q4." However, rather than a downgrade consistent with their true opinion of 24/7 and without revealing their intention to "help" the stock, they reiterated their "Buy Buy" rating. The March 7, 2000 report caused 24/7 stock to increase by $3.62 per share over the next two trading days, or more than 7 percent from its close of $51.50 per share the previous day to close at $55.125 per

share on March 8, 2000. By March 13, 24/7 again hit $60 per share.

Respondents continued to reiterate their "Buy/Buy" ratings, issuing eight additional reports between March 9 and July 5, 2000. Some of these reports also reiterated the $85 price target. Though 24/7's stock price began its dramatic decline during this period, Respondents did not lower their rating on 24/7 until August 7, 2000, when they gave 24/7 the still favorable rating of "Accumulate/Accumulate." (A-423). By that point, the stock price had dropped from the artificially inflated Class Period high of approximately $65 per share to a still inflated $11.4375 per share.

On October 10, 2000, Internet Group analyst Eve Glatt emailed Blodget a news article about problems with 24/7's key product. She commented that the article "probably confirms what you and Virg [inia Syer] ***have talked about for some time***." *Id.* (Emphasis added.) Blodget responded: "that it's a pos [piece of shit]? yes." Respondents' private, negative views regarding 24/7's critical product, were never disclosed and were utterly at odds with their positive public recommendations.

On November 9, 2000 Respondents finally succumbed to reality and downgraded 24/7 to a near-term and long-term "Neutral." As a result of the downgrade, 24/7's stock dropped from the prior day close of $4.64 per share, to close at $2.9375 per share on November 9, 2000, a loss of 36% of the stock's already greatly diminished price, which traded as high as $64.625 during the Class Period.

B. Proceedings Below

1. Coordination of the Cases

On April 8, 2002 the New York Attorney General's Office (the "AG") filed the Affidavit of Eric Dinallo in Support of Application for an Order Pursuant to [New York] General Business Law Sec. 354, and accompanying exhibits (the "Dinallo Affidavit"), disclosing that Respondents, as a matter of course, did not believe their own recommendations and operated under undisclosed conflicts of interest with respect to their Internet research coverage. The first complaint in the 24/7 action was filed on April 25, 2002. Other similar actions were filed around the same time. An MDL panel subsequently centralized all of the Merrill research report cases in the Southern District of New York. These cases were then coordinated by security, and by Order of the District Court, one plaintiff was appointed as lead plaintiff for each security. Thereafter, amended complaints were filed on March 13, 2003.

2. Motions to Dismiss

Respondents moved against these cases in stages, choosing to proceed first with actions brought by 24/7 and Interliant shareholders. With regard to loss causation, the Respondents argued that the losses were not caused by a public, corrective disclosure of the analyst fraud but by the intervening "bursting" of the Internet bubble as a result of which the prices of many Internet stocks tumbled. After oral argument, the motion to dismiss the 24/7 and Interliant Complaints was granted on June 30, 2003 on several grounds, including statute of limitations and loss causation. Pet. App. 64a – 126a. Petitioner's motions to reconsider and for leave to amend (with an amended complaint attached) were denied on August 12, 2003. Pet. App. 33a – 63a. Petitioner timely appealed.

3. The Decision on Appeal

A three-judge panel of the United States Court of Appeals for the Second Circuit reversed the decision of the District Court that the complaints were barred by the statute of limitations, but affirmed the decision that the complaints failed properly to plead "loss causation". *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005); Pet App. 1a – 32a.[2]

The Second Circuit held that a plaintiff must allege "that the misstatement or omission concealed something from the market that, ***when disclosed***, negatively affected the value of the security." *Id.* at 173; Pet. App. 22a. (emphasis added). Under this theory, a plaintiff must demonstrate that a loss was both "foreseeable" and "caused by the materialization of the concealed risk." *Id.* This theory of loss causation is premised on the assumption that artificial inflation can be reduced or eliminated from a stock price ***only*** through disclosure of the fraud, whereas, in fact, artificial inflation can be – and often is – reduced or eliminated by other means.

The Court of Appeals further found that Merrill's eventual, belated downgrades of 24/7 did not amount to a corrective disclosure causing loss, as those downgrades "did not reveal to the market the falsity of the ***prior*** recommendations." *Id.* at n.4; Pet. App. 26a n.4 (emphasis added).

Finally, the panel added a heightened – and unprecedented – pleading requirement, holding that:

> [W]here . . . substantial indicia of the risk that materialized are unambiguously apparent on the face of the disclosures alleged to conceal the very same risk, a plaintiff must allege (i) facts sufficient to support an inference that it was defendant's fraud

2. The Second Circuit declined to address the other grounds for dismissal adopted by the District Court.

> rather than other salient factors — that proximately caused plaintiff's loss; or (ii) facts sufficient to apportion the losses between the disclosed and concealed portions of the risk that ultimately destroyed an investment.

Id. at 177; Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

Introduction

This case warrants consideration for two reasons. ***First***, the various judicial circuits that have considered the question have articulated different standards for pleading loss causation in cases alleging artificial inflation of the purchase price. While this Court recently held that pleading artificial inflation of the purchase price was not alone sufficient, the Court did not specify what additional allegations might be sufficient to establish the causative link between a fraud that inflates the purchase price and a subsequent decline in price that results in an economic loss. *See Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005). Moreover, the heightened loss causation pleading standard announced by the Second Circuit seems in direct conflict with *Dura*'s "fair notice" standard.

Second, *Lentell* announced a new pleading standard for loss causation, and yet Petitioner was not afforded any opportunity to amend the complaint to meet the new standard, despite having proffered one loss causation amendment which was denied by the District Court, and an expanded proposed amendment that was proffered on appeal. Indeed, the Second Circuit did not address at all Petitioner's requests for leave to amend.

I. REVIEW IS NECESSARY TO RESOLVE A SPLIT AMONG THE CIRCUITS AND CLARIFY THE LOSS CAUSATION PLEADING REQUIREMENTS

A. The Second Circuit

In recent years, the Second Circuit has wrestled with various standards for pleading and proving loss causation. *See Lentell*, 396 F.3d at 173, Pet. App at 22a; *Emergent Cap. Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189 (2d Cir. 2003); *Suez Equity Inv, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87 (2d Cir. 2001).

1. The *Suez* Standard

In 2001 in *Suez*, the Second Circuit attempted to reconcile prior "inconsistent precedents on loss causation" and held that:

> [T]he rule derived from the holdings of *Marbury Management* [*Inc. v. Kohn*, 629 F.2d 705 (2d Cir. 1980)] and *Bennett* [*v. U.S. Trust Co.*, 770 F.2d 308 (2d Cir. 1985)], is that plaintiffs may allege transaction and loss causation by averring both that they would not have entered the transaction but for the misrepresentation and that the defendants' misrepresentations induced a disparity between the transaction price and the true "investment quality" of the securities at the time of transaction.

Suez, 250 F.3d at 97-98.

The *Suez* court held that "allegations that the misrepresentations . . . led plaintiffs to appraise the value of SAM Group securities incorrectly by assuming the competency of . . . the Group's principal" went to the "investment quality" of the securities. *Id.* at 96-98. "The

Complaint thus alleges that plaintiffs suffered a loss at the time of purchase since the value of the securities was less than that represented by defendants." *Id.* at 98.

Suez aligned the Second Circuit with other circuits which have held that "'[i]n a fraud on the market case, plaintiffs establish loss causation if they have shown that the price on the date of purchase was inflated because of the misrepresentation.'" *In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281, 378 n.145 (S.D.N.Y. 2003) (quoting *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1438 (9th Cir. 1996), and citing *In re Control Data Corp. Sec. Litig.*, 933 F.2d 616, 619-20 (8th Cir. 1991)).

Under *Suez* the loss causation allegations in the Complaint (and, additionally, in the Proposed Amended complaint) would have been sufficient.

2. The *Emergent* Standard

In 2003, in *Emergent*, the Second Circuit articulated a new loss causation standard, requiring that plaintiffs allege a "price disparity" at the time of the initial purchases, plus a "causal connection between the content of the alleged misstatements or omissions" and "the harm actually suffered." 343 F.3d at 198.

One district court in the Second Circuit recognized the inconsistency between *Suez* and *Emergent*, and the confusion created thereby: "After *Emergent Capital*, this Circuit appears to have switched camps. . . . However, because the court took pains to insist that *Suez Equity* is still good law, the sweep of *Emergent Capital* is not entirely clear." *In re Initial Public Offering Sec. Litig.*, 297 F. Supp. 2d at 672. A few things, however, were made clear by *Emergent*:

First, the requirement of loss causation ought not place unrealistic burdens on a plaintiff at the initial pleading stage.

Thus, *Emergent* held: "If the loss was caused by an intervening event, like a general fall in the price of Internet stocks, the chain of causation will not be established. ***But such is a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion***." *Emergent*, 343 F.3d at 197 (emphasis added).

Second, there was no requirement that plaintiffs allege a corrective disclosure. Indeed, the *Emergent* plaintiffs' losses were incurred long before the "pump and dump" scheme was discovered; and there was never a corrective disclosure triggering plaintiff's losses. *Emergent*, 343 F.3d at 191, 193-94, 197-98. Under *Emergent* the allegations in the Complaint, or in the Proposed Amended Complaint, would have been sufficient. The intervening decline in the market for Internet stocks, the "bursting of the Internet bubble," would not have been a barrier at the pleading stage to alleging that at least some of the losses were caused by the fraudulent analyst recommendations. Moreover, absence of a "corrective" disclosure of the analyst fraud would not necessarily negate loss causation, as a market correction could occur prior to disclosure of the fraud.

3. The *Lentell* Standard

Lentell has now articulated a third, stricter loss causation pleading standard – the loss must both be "foreseeable" ***and*** "caused by the materialization of the risk." *Lentell*, 396 F.3d at 173; Pet. App. at 22a. A plaintiff must allege "that the misstatement or omission concealed something from the market that, ***when disclosed***, negatively affected the value of the security." *Id.* (emphasis added). Moreover, the decision added a new pleading requirement, holding that loss causation must be plead with factual particularity:

> [W]here . . . substantial indicia of the risk that materialized are unambiguously apparent on the

> face of the disclosures alleged to conceal the very same risk, a plaintiff must allege (i) facts sufficient to support an inference that it was defendant's fraud — rather than other salient factors — that proximately caused plaintiff's loss; or (ii) facts sufficient to apportion the losses between the disclosed and concealed portions of the risk that ultimately destroyed an investment.

Id. at 177; Pet. App. 31a. Petitioner's Proposed Amended Complaint would have satisfied this standard.

B. The Seventh Circuit

The Seventh Circuit holds plaintiffs to an arduous loss causation standard. Plaintiffs must "allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains." *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990), *see also Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648 (7th Cir. 1997) ("To plead loss causation, the plaintiff must allege that it was the very facts about which the defendant lied which caused its injuries."). The test adopted by the Seventh Circuit "constitutes a high-water mark in the area of causation pleading." *In re Rhythms Secs. Litig.*, 300 F. Supp. 2d 1081, 1092 (D. Colo. 2004).

In *Bastian* the court held that alleged misrepresentations concerning an oil and gas limited partnership were not the cause of the losses, in the face of a steady decline in oil and gas prices subsequent to the plaintiff's investment. *Bastian*, 892 F.2d at 682. Since the "oil and gas ventures failed not because of the personal shortcomings that the defendants concealed but because of industry-wide phenomena that destroyed all or most such ventures," then the "plaintiffs, given their demonstrated desire to invest in such ventures, lost nothing by reason of the defendants' fraud." *Id.* at 685.

Even this so-called "high water mark" is less strict than *Lentell* and would have permitted the 24/7 complaint to survive. One recent District Court decision in the Seventh Circuit makes this clear:

> In the typical loss causation situation, the plaintiff alleges inflation of the stock price due to defendants' painting the company in a favorable, albeit untruthful, light, disclosure of the true state of the company at some later point, and an immediate decline in the stock price as a result of market reaction to the belated disclosure. . . . Defendants try to cast plaintiffs' claims in this mold, characterizing plaintiffs' loss as a drop in USN's stock price after the disclosure in November 1998 of certain "true" facts about the dire state at USN. Defendants argue the November 1998 disclosure could not cause the loss because USN's stock prices declined steadily during the class period. . . .
>
> Defendants' argument is unpersuasive. Plaintiffs do not contend that it was disclosure of USN's true financial state in November 1998 that caused the stock price to decline and thereby cause their loss. Rather, plaintiffs allege that their losses resulted from paying an inflated price for USN stock because of the misrepresentations and omissions occurring prior to and throughout the class period. . . . ***According to plaintiffs, the market responded to and "corrected" the price of USN stock over the better part of a year as bits and pieces of negative information became available*** and it became apparent that USN was not capable of performing as originally represented. ***Plaintiffs' allegations of an inflated***

purchase price suffice to meet their burden of pleading loss causation.

Danis v. USN Communs., Inc., 73 F. Supp. 2d 923, 943 (N.D. Ill. 1999) (emphasis added).

Thus, even under the Seventh Circuit standard, the District Court in *Danis* explicitly rejected the limiting notion that artificial inflation in a stock price can be reduced or eliminated ***only*** through a corrective disclosure of the fraud.

C. The Eleventh Circuit

The Eleventh Circuit joins the Seventh in applying a stringent loss causation standard. *See Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997). *Robbins* held that establishing loss causation "explicitly require[s] proof of a causal connection between the misrepresentation and the investment's subsequent decline in value." *Id.* at 1448.[3] An allegation that a plaintiff has purchased an artificially inflated stock is insufficient to demonstrate loss causation absent some "evidence that this price inflation was removed from the market price of [a defendant's] stock, causing plaintiffs a loss." *Id.* at 1448.

Robbins conflicts with *Lentell*'s requirement of an explicit corrective disclosure of the fraud. Pet. App. 22a.

---

3. The Eleventh Circuit, consistent with *Dura*, rejected the argument that price inflation at the time of purchase, without more, can satisfy the loss causation requirement, emphasizing that its decisions "explicitly require proof of a causal connection between the misrepresentation and the investment's subsequent decline in value." Because the court found no evidence that the price inflation alleged at the time of plaintiffs' purchase was ever removed from the market price of Koger's stock, or that the dividend cuts, which led to the drop in price, were related to the alleged misrepresentations, the court held that the plaintiffs failed to satisfy the loss causation requirement. *Id.* at 1146-47.

While requiring that the artificial inflation be removed from the stock price before a plaintiff can properly demonstrate loss causation, it does not suggest that the removal must occur ***exclusively*** through an explicit disclosure of the fraud.

In *Robbins*, the Eleventh Circuit also adopted what it described as an "intermediate approach" to pleading loss causation where there are intervening market forces. *Id.* at 1147. Because market responses are the result of many different and often unknowable factors, a plaintiff not need show that the defendant's misconduct was the sole and exclusive cause of the investment's decline in value, but only that it was a "substantial" factor or "significant contributing cause" of his injury. *Id.* at 1147 n.5.

Again, the 24/7 complaint or the Proposed Amended Complaint would have survived. The intervening decline in Internet stock prices would not have precluded the argument that a substantial portion of the decline in the price of 24/7 was the removal from the price of the analyst-induced inflation as a result of the operation of normal, market corrective forces, even if another portion of the decline was related to the general bursting of the Internet bubble.

D. The Third Circuit

The Third Circuit holds that a plaintiff must establish "that the alleged misrepresentations proximately caused the decline in the security's value to satisfy the element of loss causation." *Semerenko v. Cendant Corp.*, 223 F.3d 165, 185 (3d Cir. 2000). A plaintiff who alleges that the price of a security was artificially inflated the artificial inflation was removed by a market correction has adequately alleged loss causation. *Id.* ("In the absence of a correction in the market price, the cost of the alleged misrepresentation is still incorporated into the value of the security and may be recovered at any time simply by reselling the security at the inflated price.").

Although the Third Circuit requires that artificial inflation be removed from the price, it has not required that the removal necessarily stem from contemporaneous disclosure of the fraud. The Third Circuit's standard in the face of intervening market forces is similar to that of the Eleventh Circuit and inconsistent with *Lentell*. Pet. App. at 1a – 32a. Noting that "[i]t is well established that not every intervening event is sufficient to break the chain of causation," the Third Circuit holds that "[s]o long as the alleged misrepresentations were a substantial cause of the inflation in the price of a security, other contributing forces will not bar recovery." *Semerenko*, 223 F.3d at 187. Thus, when there were multiple potential causes for the inflated value of a stock price – some fraudulent and some not – it could not be presumed, at least at the motion to dismiss stage, that loss causation did not exist. *Id.*

E. *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005)

On April 19, 2005, the Court decided *Dura Pharms.*, which held that a plaintiff cannot satisfy the "loss causation" requirement merely by pleading that the "price *on the date of purchase* was inflated because of the misrepresentation." 125 S. Ct. at 1631 (emphasis in original). The Court declined to articulate what more *was* needed to satisfy the loss causation pleading requirement. *Id.* at 1633-34 ("We need not, and do not, consider other proximate cause or loss-related questions.").

Dura did not rule that allegations of a fraudulently inflated purchase can never form part of a properly pled theory of loss causation, nor did it foreclose the theory pled in 24/7 and other analyst fraud cases. Although the opinion noted that "the logical link between the inflated share purchase price and any later economic loss is not invariably strong," under some circumstances "[i]f the purchaser sells

later after the truth makes its way into the market place, an initially inflated purchase price *might* mean a later loss." *Id.* at 1632 (emphasis in original). The opinion did not state that the truth must necessarily enter the market through a corrective disclosure of the prior fraud, and did not foreclose a theory that the truth was gradually revealed to the market through the normal operation of the forces of supply and demand.

As to the pleading burden, *Dura* requires only that loss causation be pled according to the "fair notice" standard – "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and causal connection that the plaintiff has in mind." *Dura Pharms*, 125 S. Ct. at 1634. In this respect *Lentell*'s heightened, fact intensive loss causation pleading requirement is inconsistent with *Dura*.

The 24/7 complaint meets the *Dura* standard. It does not allege purchase price inflation alone but identifies the economic loss as the subsequent decline in price of the stock up to and including the time when the analyst ratings were belatedly downgraded, and it explains the causal connection between the subsequent price decline and the initial analyst-engendered price inflation in terms of the foreseeable operation of supply and demand. Several federal district judges have found similar loss causation theories to be logical and to meet the relevant pleading requirements. *Swack*, 2004 U.S. Dist. LEXIS 22749 at *14; *Fogarazzo v. Lehman Brothers, Inc.*, 341 F. Supp. 2d 274, 292 (S.D.N.Y. 2004); *Danis*, 73 F. Supp. 2d at 943; *Retsky Family Ltd. Partnership v. Price Waterhouse LLP*, No. 97-7694, 2001 U.S. Dist. Lexis 20397 **12-14 (N.D. Ill. 1998).

The *Lentell* standard, foreclosing a showing of loss causation absent a corrective disclosure of the fraud, ignores the practical reality that market forces often correct for and

eliminate the price inflation over time, *before* the fraudulent conduct is discovered or revealed. A properly framed loss causation inquiry should be: (1) was the stock price inflated by the fraud, and (2) was the inflation reduced or eliminated from the stock price leading to a loss at the time of sale.

Such a standard reflects "the reality . . . that stock prices sometimes self-correct in advance of the final overt disclosure." *Swack*, 2004 U.S. Dist. LEXIS 22749 at *14. *See also Fogarazzo*, 341 F. Supp. 2d at 292. ("[I]nflated stock prices can lead to a loss in one of two ways... First, there can be an external correction to the market, such as a corrective disclosure. . . . Second, there can be a market correction, where ordinary market forces affect the rate of artificial inflation."). As the *Swack* court held:

> In some cases, of course, information that could only be known by the company . . . comes to light suddenly, precipitating a dramatic sell-off. In other cases-of which analysts' public ratings may be a good example-the misleading information is one factor in a soup of other publicly available data. At one point, data that seem [sic] inconsistent with the analyst's rating may be discounted by the market on the theory that the analyst-who after all studies the company as his full-time job and is supposedly part of a "credible and insightful team" that is encouraged "to interpret [industry] information in a fair and objective manner"- has good reason to believe that the company's prospects are better than the data indicate. ***As the gap between rating and reality widens, however, the analyst's ratings gradually lose credibility and the market values them less and less. By the time the analyst bows to reality and adjusts his rating (and/or discloses the conflict that led to the misleadingly bullish rating), the market may***

> ***not be paying much attention, having already recognized the truth.***

Id. (emphasis added) (citing *Danis*, 73 F. Supp. 2d at 943 and *Retsky*, 2001 U.S. Dist. Lexis 20397 at **12-14).

That is what happened here. Merrill artificially inflated the market price of 24/7 stock by inducing more purchase demand at higher prices than would have existed in a market untainted by the fraudulent research reports.[4] The scheme contained the seeds of later losses by concealing the risk that the price would eventually erode by market forces, subjecting investors to a greater risk of a larger loss than comparable investments.[5] "Thus, the publication of the intentionally false opinions that allegedly distorted the market price of [the] stock contained the seeds of loss causation." *DeMarco v. Robertson Stephens, Inc.*, No. 03 Civ. 590, 2004 U.S. Dist. LEXIS at *32 (S.D.N.Y. Jan. 9, 2004).

The Court should grant the petition to clarify both the loss causation element and the pleading standard in cases where there has been an artificial inflation of the purchase price but the economic loss (the removal of the inflated portion of the price) has already occurred by operation of market forces before the fraud is publicly revealed.

---

4. The 24/7 complaint cited several examples where sharp increases in the market price of the stock followed Merrill buy recommendations. *Lentell* properly assumes the truth of the allegations that Merrill caused price inflation. *Lentell*, 396 F.3d at 165; Pet. App. at 4a.

5. *Lentell* stated: "Nor do plaintiffs allege that Merrill Lynch concealed or misstated any risks ***associated with an investment*** in 24/7 Media or Interliant, some of which presumably caused plaintiffs' loss." 396 F.3d at 175; Pet. App. at 27a (emphasis added). Petitioner submits that the real risk of market erosion of the artificial price inflation subjected buyers to a greater risk of risk of investment loss that was concealed by Merrill's fraud.

II. SUPREME COURT REVIEW IS NECESSARY TO CLARIFY THAT DUE PROCESS REQUIRES LEAVE TO AMEND WHEN THE COURT OF APPEALS ADOPTS A NEW, MORE STRINGENT PLEADING STANDARD.

This "Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts . . . as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (U.S. 1982). This protection stems from the procedural component of the Due Process Clauses of the Fifth and the Fourteenth Amendments, which bars state or federal action having the effect of depriving a person of "life, liberty, or property, without due process of law." U.S. CONST. AMEND. V, IV.

Determining if a due process violation has occurred involves a two pronged inquiry. First, a court must determine if the complaining party "was deprived of a protected interest," and, if so, the Court must determine if that party received appropriate procedural protections before that deprivation occurred. *Logan*, 455 U.S. at 428. As such, the inquiry here is, first, if Petitioner had a protected interest in his cause of action and, if so, if the Second Circuit adequately protected that interest when dismissing Petitioner's complaint under a standard Petitioner never had opportunity to meet.

Both of these prongs are met in the present case. First, it is beyond dispute that "a cause of action is a species of property protected by the . . . Due Process Clause." *Logan*, 455 U.S. at 428 (applying Fourteenth Amendment); *see also Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 209 (1958) (noting Fifth Amendment provided "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity *for a hearing on* the merits of his

cause."). It is similarly beyond dispute that dismissing a complaint, with prejudice, deprives the litigant of this recognized property interest. *Societe Internationale*, 357 U.S. at 211.

The question here thus turns on whether the Second Circuit provided the requisite procedural protections before dismissing Petitioner's Complaint with prejudice; the answer, manifestly, is no.

Lentell announced a new and more stringent standard for pleading loss causation.[6] Jurists have long noted the fundamental unfairness of "granting a dismissal on the pleadings without leave to amend based on a new legal standard that the drafter of the complaint had no way of anticipating." *Sun-Land Nurseries, Inc. v. Southern California Dist. Council of Lanorers*, 793 F.2d 1110, 1121 (9th Cir. 1986) (Browning, J. dissenting); *see also Brown v. Coach Stores*, 163 F.3d 706, 714 (2d Cir. 1998) (Newman, J., dissenting); *see also* U.S. Const. Am. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.") In an analogous circumstance, courts (including this Court) have held that denying a litigant before an administrative panel the opportunity to meet a new standard of law amounts to a denial of due process. *See Hatch v. Federal Energy Regulatory Com.*, 654 F.2d 825, 835 (D.C. Cir. 1981) ("Supreme Court cases suggest that . . . notice and opportunity to meet [a] new standard is a constitutional imperative of due process. . . .") (citing *West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63, 70-71 (1935); *Morgan v. United States*, 304 U.S. 1 (1938); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 165-66 (1951) (Frankfurter, J., concurring). As this is the precise situation presented here, dismissal of Petitioner's complaint

---

6. Indeed, Petitioner was faced with three separate pleading standards in the course of this litigation. *See* § I(A), *supra*.

amounts to a denial of due process and this Court should grant certiorari to make this clear.

Lentell holds that Petitioner must allege "facts sufficient to support an inference that it was defendant's fraud rather than other salient facts that proximately caused plaintiff's loss or . . . to apportion the losses between the disclosed and concealed portions of the risk that ultimately destroyed the investment." *Lentell*, 396 F.3d at 177; Pet. App. at 31a. This fact-intensive pleading standard is inconsistent with precedent and could not have been anticipated. *See Dura Pharms.*, 125 S. Ct. at 1634 ("[O]rdinary pleading rules are not meant to impose a great burden upon a plaintiff"); *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 649 (7th Cir. 1997) (the loss causation requirement "ought not place unrealistic burdens on the plaintiff at the initial pleading stage").[7]

Despite the heightened burden, Petitioner were and are prepared to meet it in an amended pleading.[8] In 24/7,

[7] No other court requires that loss causation be pled with such particularity. See *In re Electronic Data Sys. Corp. Sec. and ERISA Litig.*, 298 F. Supp. 2d 544, 560 (E.D. Tex. 2004); *Coates v. Heartland Wireless Communications, Inc.*, 26 F. Supp. 2d 910, 923 (N.D. Tex. 1998). On the contrary, such a fact intensive inquiry requires expert analysis and is more properly addressed at summary judgment or trial. *See Gebhardt v. Conagra Foods, Inc.*, 335 F.3d 824, 831-832 (8th Cir. 2003); *Tracinda Corp. v. Daimlerchrysler AG*, 197 F. Supp. 2d 42, 67-68 (D. Del. 2002); *Blatt v. Muse Tech., Inc.*, No. 01-11010, 2002 WL 31107537 (D. Mass. Aug. 27, 2002); *see also* Daniel R. Fischel, *Use of Modern Finance Theory In Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1, 17-19 (1982); Jay W. Eisenhofer, Geoffey C. Jarvis & James Banko, *Securities Fraud, Stock Price Valuation and Loss Causation: Toward A Corporate Finance-Based Theory of Loss Causation*, 59 Bus. Law. 1419, 1421, 1444-45 (2004).

[8] In light of the changing legal landscape, Petitioner requested leave to amend before the District Court and before the Second Circuit. The former denied it, while the latter ignored it.

Petitioner sought from the District Court, but was denied, leave to amend to show that the price of 24/7 stock declined substantially more than the decline in the Internet stock sector as a whole.[9] Pet. App. at 33a. The amendment compared the decline in the price of 24/7 stock from its peak price to the end of the class period (95.5%) with the decline in the Dow Jones Composite Internet Index (46.8%). 24/7 stock fell more than twice the amount that could arguably be attributable to the burst of the Internet bubble. The purpose of the amendment was to add a fact-based allegation from which it could be reasonably inferred that a substantial part of the economic loss was not caused by the intervening Internet collapse but by artificial price inflation induced by the analyst's fraud.

Petitioner proffered to the Second Circuit that he would also amend to allege that all sixteen of the individual Merrill-covered Internet stocks in this coordinated litigation declined more than the Internet sector as whole — on average they fell 93%, while the Dow Jones Internet Index fell only 61% over the comparative time periods. Petitioner submits that these facts support a reasonable and logical inference that an ascertainable portion of the losses were caused by Merrill's fraud, as opposed to other salient factors, such as the general downturn in the Internet market.[10] Petitioner also indicated that he may submit allegations based on expert opinion,

9. The 24/7 proposed amendment also included allegations negating the possibility that company-specific events caused the substantial decline in 24/7 relative to the Internet sector as a whole.

10. The general downturn in the Internet sector has enabled Merrill to cloud the issue by arguing the losses were caused by an intervening event. However, as this data shows, that downturn did not cause "comparable losses to other investors," in Internet stocks not affected by Merrill's fraud. *Lentell*, 396 F.3d at 174; Pet. App. at 25a. Investors in Merrill-covered stocks suffered much greater declines and "would have been spared . . . an ascertainable portion of that loss absent the fraud." *Lentell*, 396 F.3d at 174; Pet. App. at 26a.

which would ordinarily be reserved for summary judgment or trial, analyzing all of the factors, both market-wide and company-specific, that might have contributed to portions of the stock price declines.

Petitioner should have been granted leave to file the proffered amendments, and the District Court denied Petitioner this procedural protection. Pet. App. at 33a. The Second Circuit did not address the issue or articulate any reasons that would support the lower court's denial of leave. Pet. App. at 1a-32a.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

TRACY D. REZVANI
Counsel of Record
DOUGLAS G. THOMPSON
MICHAEL G. MCLELLAN
FINKELSTEIN, THOMPSON,
AND LOUGHRAN
1050 30th St. NW
Washington, DC 20007
(202) 337-8000

Attorneys for Petitioner